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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

TEAMSTERS LOCAL 350,

Petitioner,

and

BROWNING-FERRIS INDUSTRIES OF
CALIFORNIA, INC., d/b/a BFI NEWBY
ISLAND RECYCLERY,

Employer,

and

FPR-II, LLC, d/b/a LEADPOINT BUSINESS
SERVICES,

Employer.

Case No. 32-RC-109684

**REQUEST FOR REVIEW OF THE
REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION**

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I. INTRODUCTION

Petitioner, Teamsters Local 350 (“Union”), pursuant to Board Rule 102.67, hereby requests review of the August 16, 2013 Decision and Direction of Election of the Acting Regional Director of Region 32 (hereafter, the “Decision”), and submits the following brief in support thereof.

The Union filed the RC petition on July 22, 2013. (Bd. Exh. 1.)¹ The Union sought to represent all full-time and regular part-time employees jointly employed by FPR-II, LLC, d/b/a Leadpoint Business Services (“Leadpoint”) and Browning-Ferris Industries of California, Inc., d/b/a Newby Island Recyclery (“BFI”) at the recyclery located at 1601 Dixon Landing Road, Milpitas, California (hereinafter, “unit employees”). The petitioned-for unit excluded supervisors, clericals, and guards. (Bd. Exh. 2.)

There was no dispute that the petitioned-for unit was appropriate. (See Board Exh. 2 & Tr. 6:19-23.) There was no dispute that Leadpoint employs the unit employees. The sole issue before the Region was whether Leadpoint and BFI are joint employers of the unit employees. (Tr. 7:25-8:3; 8:17-19 & Decision, p. 2.)

BFI operates the recyclery and owns the capital on which the unit employees work. BFI has contracted with Leadpoint to provide staffing of sorters and attendant workers at its recycling facility. BFI can terminate its relationship with Leadpoint on thirty days’ notice, giving BFI de facto control over Leadpoint. By the terms of their contractual relationship, BFI retains to itself significant control over the terms and conditions of the unit employees. BFI dictates certain hiring criteria, reserves to itself the right to reject or dismiss any unit employee for any reason whatsoever (which it has exercised on three occasions), sets a specific ceiling on wage rates for unit employees and indirectly controls unit employees’ wage rates through its payment system, and reserves the right to enforce work rules. BFI decides how many unit employees will be working at its facility each day. BFI sets the shift times. BFI decides if unit employees will be working overtime.

¹ Citations to the record presented to the Regional Director are as follows, “Bd. Exh.” refers to an Exhibit submitted by Region 32; “Jt. Exh.” refers to a Joint Exhibit; “Tr.” refers to a transcript of the hearing before Hearing Officer Paloma Loya on August 5, 2013; “Union Exh.” Refers to an Exhibit submitted by the Union.

1 BFI supervises and controls the day-to-day work of the unit employees. BFI constantly
2 monitors the work of the unit employees. The unit employees working as sorters work on material
3 lines which are solely controlled by BFI. BFI dictates the number of employees at work on each line
4 and will move employees according to its assessment of productivity. BFI decides when the lines
5 start and stop and control unit employee breaks. BFI decides how fast the lines run. BFI sets
6 productivity standards for the unit employees, which it monitors and enforces. BFI trains and directs
7 unit employees both directly and by relaying directions through Leadpoint supervisors. BFI's
8 directions include how to perform the work. BFI's core business depends on the unit employees
9 performing to BFI's standards.

10 The Regional Director found that BFI and Leadpoint are not joint employers and the
11 petitioned-for unit of employees are solely employed by Leadpoint. (Decision, p. 19.) Petitioner seeks
12 review of this decision on three separate grounds, (1) the Decision is based on clear errors of fact that
13 prejudicially affects the Union; (2) the Decision is a departure from precedent; and (3) there are
14 compelling reasons for reconsideration of the Board's standard for finding joint employer status.
15 Each ground provides an independent basis for reversal.

16 In finding that BFI and Leadpoint are not joint employers, the Regional Director ignored
17 evidence submitted by the Union that BFI supervises and directs the manner in which the bargaining
18 unit employees work. The Decision wholly ignored the testimony of three Union witnesses. The
19 Decision likewise ignores evidence of other indicia of BFI's control over the terms and conditions of
20 employment. The Regional Director's failure to consider the entire record was prejudicial. In
21 reaching its Decision, the Regional Director simply ignored the evidence that contradicted its
22 findings without explanation. The full record establishes that BFI and Leadpoint are joint employers
23 under the current standard and, therefore, the Decision should be reversed.

24 Additionally, there are compelling reasons for reconsideration of the Board's standard for
25 finding joint employer status, as forcefully urged by Wilma Leibman in concurrence, to further the
26 purpose of the Act. The Board's current flawed standard permits, as BFI may succeed in doing here,
27 the calculated restructuring of employment and insertion of a contractor to insulate itself from the
28 basic legal obligation to recognize and bargain with the employees' representative. In evaluating

joint employer status, the Board should consider whether the industrial realities make one company a necessary party to meaningful collective bargaining; whether the contracting entity exercised “indirect control” over terms and conditions of employment; and whether the contracting entity has contractual authority to control employment conditions. This broader approach ensures that employees are not prevented “from bargaining with the company that, as a practical matter, determines the terms and conditions of their employment.” *In re Airborne Freight Co.*, 338 NLRB 597 (Liebman, concurring). Applying any of these joint-employer standards, the record establishes that BFI jointly employs the petitioned-for unit of employees.

The Regional Director's Decision frustrates the purpose of the Act. Failing to find that BFI jointly employs the unit employees prevents the unit employees from bargaining with the company that, as a practical matter, determines the terms and conditions of their employment. The Regional Director's direction of election is an exercise in futility. Without BFI's participation, meaningful collective bargaining is impossible.

II. STATEMENT OF FACTS

A. BFI's Integrated Recyclery Operation

BFI operates a recyclery in Milpitas, California. (Tr. 13:4-9.)² BFI receives approximately 1200 tons a day of mixed materials, waste and recyclables that are sorted into commodities and sold. (Tr. 13:4-9.) BFI solely employs approximately 60 employees who work at the recyclery in the receipt and movement of these commodities in various positions, including, loader operators, equipment operators, forklift operators, sort line equipment operators, spotters, mechanics, and one sorter. (Tr. 14:14-20; 32:21-22.) These employees are not the subject of the Union's petition.

BFI maintains machinery used in the sorting process, including a series of conveyors, screens and motors. (Tr. 15:20-23.) BFI has built platforms around the conveyors which contain stations for sorters to sort out prohibited or recyclable materials. (Tr. 15:23-16:3; 187:1-5.) Leadpoint cannot increase the number of employees per line; they are set by BFI. In general, a sorter must be at the work station working while the belt is moving. (Tr. 187:1-3.)

² BFI is a subsidiary of Republic Services. BFI is referred to by employees generally and in the record as Republic Services. (Tr. 43:5-19.)

1 The efficient running of the sorting operation is integral to BFI's business. BFI employs an
2 operations manager at the Recyclery, Paul Keck, and a shift manager for the day shift (John Sutter)
3 and a shift manager for the swing shift (Augustine Ortiz). (Tr. 17:13-23.) BFI's managers are charged
4 with ensuring that its sorting operation runs efficiently and productively. (Tr. 81:23-25.)

5 **B. BFI's Contract with Leadpoint**

6 BFI has contracted with Leadpoint to provide the employees to perform the sorting work. (Tr.
7 16:23-17:1.) BFI directly employs one sorter who works alongside the unit sorters. (Tr. 14:17; 31:5-
8 6; 153:13-19 (BFI managers testified that the sorter works on the container line and the other nine
9 positions on that line are filled by unit employees).) The job duties of the BFI-employed sorter are the
10 same as the unit sorter. (Tr. 155:4-9.) If the BFI-employed sorter is not at work on a particular day, a
11 unit employee performs her duties. (Tr. 155:10-12.) BFI has also contracted with Leadpoint to
12 provide employees to perform attendant work, including general labor for the composting operation,
13 screen cleaning, maintenance help, and housekeeping work. (Tr. 18:21-24; 185:24-186:5.)
14 Approximately 185 unit employees work at the BFI facility. (Tr. 185:12-17.)

15 BFI and Leadpoint have entered into a written agreement for these labor services. (Jt. Exh. 1.)
16 BFI requires that Leadpoint drug test the contract-employees within 30 days prior to being referred to
17 BFI. (Jt. Exh. 1, p. 2; Tr. 45:12-46:4.) BFI reserves the right to itself to enforce its safety policies as
18 to Leadpoint employees. (Jt. Exh. 1, p. 4.) BFI Division Manager Carl Mennie affirmed, "I am sure
19 that the agreement says that we can enforce or we can have a safety policy onsite and require
20 Leadpoint to live up to it." (Tr. 47:23-48:10.)

21 BFI reserves to itself the right to "reject any personnel" and to "discontinue the use of any
22 personnel for any or no reason," which it has exercised on three occasions. (Jt. Exh. 1, p. 4; Tr. 47:4-
23 13; Tr. 182:9-22.) BFI reserves to itself the authority to inspect the personnel records of Leadpoint
24 employees. (Tr. 48:19-21.)

25 BFI restricts the maximum wages that Leadpoint can pay to its employees. (Jt. Exh. 1, p. 1
26 ("[Leadpoint] shall not, without [BFI]'s prior approval, pay a pay rate in excess of the pay rate for
27 full-time employees of [BFI] who perform similar tasks."); Tr. 179:11-17.)
28

1 The agreement between BFI and Leadpoint is cancellable at will upon 30-days notice. (Jt.
2 Exh. 1.) BFI owns the capital and equipment upon which the unit employees work. Thus, BFI has de
3 facto control over Leadpoint's operations. BFI exercises actual control over Leadpoint's employees,
4 as will be described in more detail below.

5 **C. BFI's Control Over the Sorting Operation**

6 **1. BFI Sets the Number of Unit Employees**

7 On any given day, BFI determines what lines will be running. (Tr. 36:1-3.) BFI controls and
8 determines the number of people working on any particular line. For example, on Friday, August 2,
9 2013, BFI, through its Manager Paul Keck, instructed Leadpoint to reduce by 2 per shift, the number
10 of employees on a particular line. (Union Exh. 1; Tr. 54:5-11.) BFI then instructed Leadpoint as to
11 the positions of the remaining people on that particular line and their duties. (Union Exh. 1; Tr.
12 54:12-15.) BFI set the effective date for the change. (Union Exh. 1; Tr. 149:8-10.) BFI, and only BFI,
13 has the authority to implement such changes.

14 Each day, BFI tells Leadpoint the target headcount (or number of employees) for the day
15 depending on the number of lines that BFI is going to run. (Tr. 36:4-12; 105:17-21.) Leadpoint
16 complies with the target headcount, it does not supply more employees. (Tr. 36:13-19; 165:1-6.) BFI
17 pays Leadpoint based on the number of hours that the Unit employees work. (Tr. 39:21-40:7.) BFI
18 receives a daily report on the hours worked by the Unit employees, broken down by employee. (Tr.
19 55:8-10; 147:23-25.)

20 **2. BFI Controls the Line and Determines the Hours Worked Each Day by Unit Employees,** 21 **including Breaks and Overtime, and the Rate and Speed of the Work**

22 BFI employees operate the conveyer belts or lines. (Tr. 31:10-17.) BFI, and solely BFI,
23 controls when the line starts and when the line stops. The BFI shift supervisor and the BFI line
24 operator collaborate to determine when to stop the line for breaks. (Tr. 41:17-18; 87:3-7.) For
25 example, BFI shift supervisors will decide whether or not to call a break if the machinery breaks
26 down. (Tr. 89:2-3; 108:23-25.)

27 BFI also controls when the lines start running and, therefore, dictates whether the Unit
28

1 employees have sufficient time to stretch. (Tr. 206:14-16 (Leadpoint supervisor noting that
2 sometimes stretching gets cut short because BFI starts the lines); 281:17-21.)

3 BFI controls the speed at which the line runs throughout the shift and, therefore, the speed at
4 which the sorters work. (Tr. 40:14-21; 100:23-24; 108:13-22.) The BFI shift supervisor and the BFI
5 line operator collaborate to determine the belt speed. (Tr. 41:10-16.) BFI runs the speed at what it
6 believes is the optimal speed to sort most efficiently. (Tr. 110:8-111:4.) BFI adjusts the speeds or
7 makes other adjustments to the running of the line, such as adjusting a screen, or telling workers to
8 pick more, based on the performance of the workers. (Tr. 111:6-21.)

9 BFI controls whether Unit employees will work overtime by deciding if and when lines will
10 keep running past the shift time. (Tr. 87:8-23; 107:19-108:3; Tr. 274:21-275:20 (explaining that
11 sometimes the workers are not even told that they are working overtime, but the lines keep running so
12 they must keep working overtime).)

13 BFI maintains productivity standards for the lines, including how much time the equipment is
14 down versus running and how many tons per hour are processed on the individual lines. (Tr. 41:19-
15 25.) Those productivity standards, which apply to the Unit employees, are set by the BFI shift
16 supervisor and BFI line operator. (Tr. 42:11-16.) BFI supervisors are tasked with ensuring the
17 productivity of the lines. (Tr. 81:23-25.)

18 In sum, the sorters' work is dictated by the line, which is solely controlled by BFI. (Tr.
19 155:14-19.)

20 3. BFI Determines and Trains Unit Employees In How the Work Is Done

21 BFI expanded its facility and reopened approximately one year ago. BFI supervisor John
22 Sutter testified that at that time, BFI trained everyone, including Leadpoint employees as to how to
23 perform their job, including what to pull off the belt, and how to fix a jam. (Tr. 102:6-103:1.) Sutter
24 also testified that BFI has trained Leadpoint supervisors on how to deal with various issues as they
25 have arisen. (Tr. 115:4-22; 116:5-11.) For example, BFI had its mechanics train Leadpoint
26 supervisors and unit employees on how to clear jams. (Tr. 115:24-116:4.) Because of this training
27 BFI can now typically point out problems to Leadpoint supervisors to handle in conformance with
28 their previous instruction.

1 BFI's control over how the work is done did not end with this initial training; it continues on a
2 daily basis. BFI managers specifically instruct unit employees as to how to perform their work.
3 Travis Stevens gave un rebutted testimony that BFI manager Ortiz regularly comes to his line, works
4 beside the unit employees and instructs them specifically as to what materials to remove, to work
5 faster, and to minimize stopping the line. (Tr. 244:22-245:10.) BFI managers Keck and Ortiz, held a
6 meeting the week before the hearing, instructing swing shift employees as to what product needs to
7 come off and which items should be given higher priority. (Tr. 246:17-23; 259:24-260:5.) Ortiz has
8 instructed the unit employees numerous times at meetings and on the lines as to what material should
9 be picked off the line and in what priority. (Tr. 259:10-15.)

10 The BFI day shift manager John Sutter has likewise come to the line and specifically
11 instructed the unit employees as to what materials to grab. (Tr. 222:2-6.) Marivel Mendoza gave
12 uncontradicted testimony that John Sutter has instructed her on several occasions about how much
13 plastic needs to be removed. (Tr. 282:6-19.)

14 BFI supervisors have conducted meetings with unit employees to discuss quality issues on
15 certain lines. (Tr. 83:3-6; 83:19-21; 84:24-85:1; 112:17-24; 136:17-19.) For example, Keck held
16 several meetings with the unit employees who work on the wet line and commercial single stream
17 line and instructed them as to how to remove plastic and what techniques to use in doing so. (Tr.
18 113:10-12; Tr. 146:16-19.) Keck testified that he explained the difference between organic and
19 inorganic items to teach them what items should be removed, or in other words, how to do their job.
20 (Tr. 145:16-24.) Keck admitted that the purpose of these meetings was for unit employees to comply
21 with his directions. (Tr. 145:25-146:3.) Keck admitted that he was prompted to hold these meetings
22 based on his observations about the unit employees' work. (Tr. 147:4-12.)

23 On another occasion, approximately two weeks before the hearing, BFI supervisor Ortiz took
24 the swing shift employees around the plant instructing them as to how to do their job and specifically
25 the difference between good output and bad output. (Tr. 247:12-248:6; Tr. 272:7-19.) These
26 directions was enforced through Leadpoint supervisors threatening discipline. (Tr. 259:3-8.)

27 Sutter has also instructed the unit employees that they cannot slow or stop the line. (Tr.
28 222:10.) Sutter called a group of unit employees to the control room to discuss rejections and told

1 them to work more efficiently and work harder. (Tr. 222:14-223:10.) Similarly, Keck held a meeting
2 with employees on the swing shift in which he instructed them as to how many times they hit the
3 button to stop the line and instructing them to minimize the button pressing. (Tr. 245:15-21; 246:4-
4 12.)

5 Ortiz explained that when he observes a quality issue on the line, he contacts the Leadpoint
6 supervisor, to deal with the issue. (Tr. 75:22-76:3; 82:8-22; 98:20-99:5.) Similarly, Ortiz admits that
7 he instructs the unit employees to do something else, like clean up, if a line goes down by instructing
8 the Leadpoint supervisors. (Tr. 86:8-18.) John Sutter, the day shift manager, raises a problem with a
9 line (such as there is too much plastic) and expects the Leadpoint supervisors to handle it, as they
10 know how to do. (Tr. 99:1-10.)

11 When BFI managers observe a quality issue they either bring it to the Leadpoint supervisors
12 attention or intervene themselves. (Tr. 111:16-21 (Sutter admitting that he may adjust speeds, adjust
13 screens or tell employees to pick up the pace to deal with productivity issues); Union Exh. 1 (BFI
14 managers moved two positions off the line to increase efficiency); Tr. 147:4-12 (Keck held meetings
15 with the wet line regarding their job based on observations of the quality of the work); Tr. 296:10-
16 297:5 (Keck instructed employees to clean their areas before going on break directly because when
17 he tried giving the instruction through the Leadpoint leads it was not successful).)

18 4. BFI Monitors How Leadpoint Contracted Employees Perform Their Work

19 BFI's line operator monitors unit employees throughout their shift. The BFI supervisors
20 remain in constant contact with the BFI line operator and the Leadpoint supervisors. BFI has
21 provided walkie-talkies to the Leadpoint supervisors for this purpose. (Tr. 39:12-17; 104:8-13;
22 104:17-19.).)

23 The day and swing shift BFI supervisors spend a significant amount of their work day
24 observing the work of the unit employees. (Tr. 75:20-22; Tr. 114:22-115:3.) Similarly, the operations
25 manager, above the shift supervisors, spends 30% of his work time in areas with unit employees. BFI
26 supervisors are in the sorting area every day, throughout the day. (Tr. 82:23-25; see also Tr. 270:2-4
27 (testimony of Andrew Mendez that he frequently sees supervisor Ortiz walking around the sorter
28

1 area.) Indeed, the swing shift supervisor estimated that he spent 40% of his shift in direct
2 communication with Leadpoint supervisors. (Tr. 74:20-22).

3 Prior to each shift, the BFI supervisors meet with the Leadpoint supervisors to discuss the
4 work for that day. (Tr. 40:8-13.) BFI holds a daily preshift meeting with the Leadpoint supervisors,
5 before the start of the day and swing shifts. (Tr.75:6-10; 107:10-16.) In the words of the BFI day shift
6 supervisor, he “dictate[s] what lines are going to be run” and discusses and “coordinate[s] what’s
7 going to be executed throughout the day.” (Tr. 75:6-10.) The BFI shift supervisors “oversee what
8 needs to be done” on the lines, so they set forth the plan for the day. (Tr. 90:9-12.) In other words,
9 BFI directs the work that will be performed by the unit employees each day.

10 5. BFI Changes the Assignments and Duties of Leadpoint-Contracted Employees

11 It is undisputed that BFI dictates the positions to be filled by Leadpoint employees. (See, e.g.,
12 Union Exh. 1 (eliminating two positions from a line).) In addition, BFI has directed changes to
13 positions of specific unit employees. BFI supervisors sometimes direct specific sorters to move from
14 one line to another and perform different job duties. (Tr. 210:23-211:8.) The Leadpoint supervisor
15 who testified admitted that BFI may direct Leadpoint supervisors to move a sorter from one line to
16 another. (Tr. 211:1-8; 211:15-18 (explaining that the BFI control room operator may advise a sorter
17 to move to a different line).)

18 Marivel Mendoza gave un rebutted testimony that John Sutter has directed her on a couple of
19 occasions to actually move lines to work on a different line based on her skill. (Tr. 282:20-25;
20 283:13-15.) Mendoza has followed those directions. (Tr. 283:10-12.) Similarly, David Martinez who
21 operates the belts from the control room has moved Mendoza to different locations. (Tr. 283:16-
22 284:1.) Mendoza has followed those directions. (Tr. 284:2-4.)

23 Travis Stevens, was told by Leadpoint supervisors that he was being moved from the
24 maintenance helper position to the sorter position because Paul Keck had told Leadpoint that there
25 was insufficient headcount. (Tr. 244:6-16.) Travis Stevens was also told by Leadpoint supervisor
26 Pena that he was becoming a maintenance helper because BFI employees had asked for him.
27 (Tr. 255:9-21.)
28

1 **D. BFI Controls the Non-Sorter Unit Employees**

2 BFI regularly gives directions directly to unit employees who do not work as sorters. (Tr.
3 216:7-20; 217:23-218:11.) Clarence Harlin, who works in housekeeping, estimates that he receives
4 directions from BFI directly at least a couple of times per week. (Tr. 217:23-218:11.) Harlin testified
5 that Keck has instructed him to clean the fence line and this has now become part of his job duties.
6 (Tr. 229:7-13.)

7 BFI, and only BFI, directs the work throughout the day of the unit employees working as
8 maintenance helpers. Travis Stevens gave un rebutted testimony that he worked as a maintenance
9 helper, approximately two or three weeks prior to hearing and when he worked in that position he
10 only received directions from BFI. (Tr. 241:13-20.) While working as a maintenance helper he was
11 instructed as to what to do by BFI mechanic Pablo or BFI shift supervisor Ortiz and received no
12 direction or oversight from Leadpoint supervisors. (Tr. 241:13-20; 242:11-15.) Stevens gave
13 un rebutted testimony that he was trained as a maintenance helper by BFI. When Stevens was placed
14 in that position he did not know how to repair any machinery and he was shown how to fix the
15 machines by BFI. (Tr. 241:22-242:10.) Stevens worked to repair the machines, as directed by BFI,
16 and in accordance with how BFI trained him to fix the machines. (Tr. 242:16-18.) If Stevens did not
17 know how to fix a machine or had a question about how to perform his job, he would go to BFI. (Tr.
18 242:19-22.) While working as a maintenance helper, he worked alongside BFI employees. (Tr.
19 243:18-20.) BFI manager admitted that mechanics work alongside unit employees, who provide
20 assistance to the BFI mechanics. (Tr. 32:21-34:16.)

21 Stevens gave un rebutted testimony that when he works on Saturdays he receives instructions
22 throughout the day from BFI employees. (Tr. 249:1-8; 266:20-267:9.)

23 **E. BFI Sets and Enforces Work Rules**

24 BFI has set and enforced various work rules for the unit employees. BFI has rules as to when
25 the unit employees can use the emergency stops on the line. All three BFI managers who interact
26 with unit employees confirmed that they have instructed the Leadpoint leads regarding pulling the
27 emergency stop and decreasing the instances that the line stops, so that the leads train and enforce
28 this rule for the unit employees. (Tr. 41:6-9; 88:2-9; 103:2-13.) Sutter, the day shift manager, has

1 given specific instructions to the unit employees, through their leads, as to when it is appropriate to
2 press the emergency stop. (Tr. 103:19-22.) BFI monitors how often the emergency stop is being
3 pressed and follows up with supervisors. (Tr. 103:23-104:9.) Travis Stevens testified that he his line
4 has been instructed not to press the emergency stop button by Ortiz directly. (Tr. 245:1-21.) Ortiz has
5 held meetings with the Unit employees to review the number of times that they have pressed the
6 button and to minimize the button pressing to reduce downtime. (Tr. 245:13-21.)

7 BFI maintains other work rules that it enforces as to Leadpoint employees. (Tr. 48:2-11.) BFI,
8 for example, has enforced against Unit employees, its alcohol-free workplace rule. (Union Exh. 2; Tr.
9 58:13-25 (commenting that an email from BFI-management requesting dismissal of Unit employees,
10 “reinforces our standards on worksite safety and alcohol.”) On one occasion, Keck observed two unit
11 employees with a bottle of alcohol and he immediately called a Leadpoint supervisor via walkie-
12 talkie and informed him that “we couldn’t tolerate this on the jobsite.” (Tr. 131:13-132:10.) Keck
13 admitted his statement implied a demand of discipline. (Tr. 132:9-10.) Keck also sent an email
14 demanding that the workers be dismissed. (Union Exh. 2.) Keck described his enforcement actions
15 as, “not on my watch.” (Tr. 143:14-144:1.) Keck himself spoke to one of the employees about the
16 incident and called him a liar. (Tr. 204:2-8.)

17 BFI expects unit employees to keep their work areas clean. (Tr. 112:6-8.) BFI has instructed,
18 through the Leadpoint supervisors, that unit employees clean up their areas before they go to break
19 and after the belt stops. (Tr. 112:9-12; 273:11-15; 284:17-285:3.) On rebuttal, Keck admitted that he
20 had personally given these instructions. (Tr. 296:2-7.) Keck explained, “I wanted to make it very
21 clear, this is a cultural change in that -- or condition change. I think the condition was that when they
22 -- the bell rang, everybody just simply abandoned their worksite and headed off to take their break.
23 And we needed to recondition to simply stop, collectively gather up the debris that was on the
24 ground.” (Tr. 296:10-15.) Keck explained that he gave this message directly because he had tried
25 delivering it through the Leadpoint supervisors, however, the directions had not been followed. (Tr.
26 296:23-297:5.) Ortiz has instructed unit employees that they must clean the area. (Tr. 245:13-15.)
27 These instructions are enforced through Leadpoint supervisors. (Tr. 257:9-15.) Moreover, Ortiz has
28

1 directly directed sorter employees to clean up specific areas after handing him a broom. (Tr. 270:11-
2 23.)

3 In other words, BFI has dictated a change to the unit employees' break times, and dictated a
4 change in their work duties. The unit employees have followed these directions. (Tr. 274:6-16.)

5 **F. BFI Controls the Shift Times and Days Worked**

6 BFI sets the shifts that the unit employees work. (Tr. 39:18-20.) BFI's current schedule for the
7 unit employees, as determined by Keck, is day shift: 4am - 12:30pm for two lines and 4am-1:00pm
8 for two lines; swing shift starts at 2pm. (Tr. 140:19-141:2.) Leadpoint has no authority to change the
9 shift times. (Tr. 148:6-11.) BFI determines if a particular line is going to keep running at the end of
10 the scheduled shift and run overtime. (Tr. 37:5-7; 38:9-12; 141:3-11.) That decision dictates whether
11 the Leadpoint contracted employees will work overtime.

12 BFI determines the holidays that the facility is closed and Leadpoint does not have the
13 authority to shut down the facility for different holidays. (Tr. 51:18-25.) Leadpoint cannot decide to
14 provide its employees a different holiday on a day that BFI is open. (Tr. 179:4-10.)

15 **G. BFI Controls and Maintains the Facility**

16 BFI maintains and provides the bathrooms, break room and parking lot at the facility, which is
17 jointly used by the employees employed solely by BFI and the unit employees. (Tr. 52:10-16.) BFI
18 also maintains at least two cameras at the facility on which unit employees may be videotaped. (Tr.
19 208:8-19.) These cameras are not owned or installed by Leadpoint and the footage is not reviewed by
20 Leadpoint. (Tr. 209:1-5.) These cameras, however, have been used on at least one occasion by BFI
21 for disciplinary purposes, to secure the dismissal of a unit employee work at the BFI facility. (Union
22 Exh. 2.)

23 Unit employees typically do not wear BFI gear, however, when BFI held a video and photo
24 shoot, it required the unit employees to wear BFI gear. (Tr. 51:1-6.)

25 **H. BFI Exercises Its Authority to Dismiss Unit Employees**

26 On three occasions BFI has exercised its authority to discontinue the use of unit employees.
27 (Union Exh. 2.) In June 2013, BFI Manager, Paul Keck informed Leadpoint that he requested the
28 "immediate dismissal" of three unit employees. He stated that he witnessed two unit employees

1 with alcohol on the job site and he saw on camera a third Leadpoint employee punch an exit sign.
2 (Union Exh. 2; Tr. 58:9-25.) On all three occasions, Leadpoint dismissed the employee from work at
3 BFI. (Tr. 170:4-5; 199:14-18.) On every occasion that BFI has requested dismissal from the facility,
4 Leadpoint has complied. (Tr. 151:12-16; Tr. 184:1-4.) BFI manager Keck testified that in addition to
5 him, he believed that Carl Mennie reserved the right to dismiss unit employees from the job site. (Tr.
6 151:17-25.)

7 Keck testified that he has never been involved in any discipline for a Leadpoint worker. (Tr.
8 129:12-14.) However, this is belied by the documentary evidence and his own admissions that he
9 requested dismissal of three employees. (Union Exh. 2.)

10 11 **III. ARGUMENT**

12 **A. The Regional Director's Decision Is Clearly Erroneous and Contrary to the Record Evidence**

- 13 1. The Regional Director Ignored the Union's Evidence and Credited Contradicted Evidence
14 Without Explanation in Erroneously Finding that BFI Does Not Control or Co-Determine
the Unit Employees' Daily Work nor Supervise the Unit Employees

15 The Regional Director's findings that BFI does not control or co-determine the daily work of
16 the unit employees, nor supervise the unit employees are contrary to the record evidence. (See
17 Decision, pp. 9-11.) In reaching these findings, the Regional Director ignored significant evidence
18 presented by the Union and credited contradicted evidence without explanation. The Regional
19 Director relied on these erroneous factual findings to determine that BFI is not a joint employer.
20 (Decision, pp. 17-18.)

- 21 a. *The Regional Director Erroneously Credits Testimony of BFI's Witnesses that*
22 *they Do Not Give Daily Work Instructions to the Unit Employees That Is*
Contradicted by Those Same Witnesses and Other Record Evidence

23 The Regional Director's finding is based on the fact that BFI Operations Manager Paul Keck
24 and BFI shift supervisors Augustine Ortiz and John Sutter testified that they do not instruct or give
25 daily work directions to the unit employees. (Decision, p. 9.) This testimony was given in the form of
26 single one-word answers to leading questions posed by BFI's counsel. (See, e.g., Tr. 74:11-16;
27 127:23-129:11.) The Regional Director failed to explain why it relied on this testimony. It should not
28

1 have been credited because it is later contradicted by these same witnesses' admissions and other
2 record evidence.

3
4 i. The Testimony was Contradicted by the Witnesses Own Admissions on
Cross Examination

5 On cross-examination, these same witnesses contradictorily admitted that they had given
6 direct instructions to the unit employees as to how to perform their work. Keck admitted that he has
7 conducted meetings with unit employees and instructed them on how to perform their work. (Tr.
8 146:16-147:3; 145:16-24.) BFI supervisor Sutter corroborated that Keck held such meetings and used
9 them to direct unit employees as to what to remove from the line and the techniques to use in doing
10 so. (Tr. 112:17-113:2.) Keck called these meetings with unit employees based on his observations
11 about how these employees were performing their work. (Tr. 147:4-12.) Keck admitted that the
12 purpose of these meetings was to gain compliance by the unit employees with the instructions given.
13 (Tr. 145:25-146:3.) Keck further admitted on other occasions to instructing unit employees directly as
14 to what work to perform, specifically, that they needed to clean their areas before going on break. (Tr.
15 296:10-297:5.) The Regional Director failed to explain why it credited Keck's initial terse testimony
16 that he did not give work instructions to the unit employees when he later admitted to doing so during
17 a series of meetings. The Regional Director failed to consider in its determination the evidence,
18 including through Keck's and Sutter's own admissions, that he held instructional meetings with unit
19 employees, including covering how to perform their work.

20 On cross-examination, Ortiz likewise admitted that he has conducted meetings directly with
21 unit employees, including to discuss safety issues and quality issues. (Tr. 83:3-6; 83:19-21; 84:24-
22 85:1.) Ortiz admitted that after he noticed quality issues with the unit employees' work that he spoke
23 to them directly about fixing the problem by explaining the impacts on quality and the customer. (Tr.
24 84:6-15.)

25 Ortiz's initial denial that he directed unit employees, which the Regional Director apparently
26 credited, was particularly unreliable. Ortiz testified that he never speaks with Leadpoint workers
27 directly, (Tr. 74:14-16), however, this testimony was refuted by his own later admissions that he
28 conducts meetings with unit employees, the testimony of two Union witnesses Travis Stevens and

1 Andrew Mendez who gave specific examples of Ortiz's direct instruction to unit employees (e.g., Tr.
2 245:1-21; 247:12-248:6; 270:11-23; 272:7-19), and the Leadpoint supervisor who has observed BFI
3 supervisors speaking directly to unit employees (Tr. 210:19-22.) The Regional Director failed to
4 explain its crediting of Ortiz's initial denial with his later admissions.

5
6 ii. The Regional Director Ignored Other Evidence Establishing that Unit
Employees Receive Daily Work Instructions Directly from BFI Supervisors

7 Despite the denials of the BFI supervisors, the Union presented testimony from Marivel
8 Mendoza, Travis Stevens and Andrew Mendoza, who provided specific examples of directions,
9 including how to perform their work, received directly from those BFI supervisors. BFI failed to
10 rebut this specific testimony, though BFI could have recalled Ortiz and Sutter or questioned Keck on
11 these topics. In its Decision, the Regional Director completely ignored the Union witness testimony
12 and gave no explanation as to why it credited the BFI supervisors' responses to leading questions
13 over the Union witnesses, especially given BFI's failure to recall these witnesses to rebut the specific
14 testimony. The evidence demonstrates BFI's direct intervention to instruct unit employees as to how
15 to perform their jobs, including the material to prioritize, the speed of the work and diminishing the
16 pressing of the stop button, to improve productivity.

17 Travis Stevens, a unit employee currently working as a sorter on the swing shift, testified that
18 BFI shift supervisor Ortiz regularly comes to his line, works beside the unit employees and instructs
19 them specifically as to what materials to remove and as to when they may press the emergency stop
20 button on the lines to slow them down. (Tr. 224:22-245:10 ("[Ortiz] will come to my line and he'll
21 work beside us, telling us, 'You guys need to take his off. You need to take like more plastic clothes.
22 Stop pressing the button so many times, you guys press the button this many times. Don't pull the E-
23 stop, just let stuff go through.'"))

24 Travis Stevens also testified about a meeting held one week prior to the hearing instructing
25 the unit employees on his shift as to what products need to come off the line and which items should
26 be given higher priority and that Ortiz has instructed unit employees multiple times as to what
27 material should be picked off the line and in what priority. (Tr. 246:17-23; 259:10-15.) Again, Ortiz
28 was not recalled to rebut this testimony.

1 Stevens and the unit employees on his line also attended a meeting held by Keck which he
2 called to instruct the new unit employees in how to perform their job and what to pick off. (Tr.
3 259:19-23.) Keck told the employees that the line was not budgeted, so if the employees failed to
4 pick sufficiently or meet quota, it would be eliminated, the implication being that the unit employees
5 would no longer have work. (Tr. 259:24-260:5.) Keck was called back to testify and denied that he
6 said anyone would lose their job, however, he admitted that he held such a meeting and did not deny
7 the instructions to the unit employees about how to perform their job. (Tr. 289:22-290:4.)

8 Stevens also testified about a meeting conducted by Keck with the swing shift employees.
9 Keck shut down the line and reviewed with them the number of times they had hit the button to stop
10 the lines and instructed them to minimize button pressing to meet the productivity standards set by
11 BFI. (Tr. 245:15-21; 246:4-12; 258:12-17.)

12 Two Union witnesses testified that approximately two weeks before the hearing Ortiz
13 conducted a meeting in which he took the swing shift unit employees around the plant instructing
14 them as to how to do their job and showing them the difference between good output and bad output.
15 (Tr. 247:12-248:6; 272:719.) These directives were enforced through discipline threats by Leadpoint
16 supervisors. (Tr. 259:3-8.)

17 Stevens further testified that Ortiz has instructed him and the other unit employees on his shift
18 to clean their areas at specific times. (Tr. 245:13-15.) Stevens testimony is essentially corroborated by
19 Keck's own admissions that he personally has instructed the unit employees on cleaning their areas
20 (Tr. 296:10-297:5), supporting an inference that Stevens' testimony is accurate and Ortiz, following
21 the lead of his own boss Keck, has instructed unit employees to clean. Ortiz was not recalled to rebut
22 this specific testimony. The Regional Director without any findings regarding Stevens' testimony,
23 simply ignored it and credited Ortiz's unreliable denial without explanation.

24 Clarence Harlin, a unit employee currently working in housekeeping, but who previously
25 worked as a sorter on the day shift, testified that Sutter has come to the line and specifically
26 instructed unit employees regarding what material to grab. (Tr. 222:2-6.) Harlin also testified that
27 Sutter called a group of unit employees into the control room to discuss quality issues and directed
28 them to work more efficiently and work harder. (Tr. 222:14-223:10.)

1 Marivel Mendoza testified that Sutter has instructed her directly on several occasions
2 regarding the amount of plastic to be removed from the lines. (Tr. 282:6-19.) Sutter was not called to
3 rebut this specific testimony made from personal knowledge. Mendoza also gave uncontroverted
4 testimony that BFI supervisors have directed her to move from one line to another. (Tr. 282:20-25;
5 283:13-15.) Mendoza has followed those directions. (Tr. 283:10-12.) Similarly, David Martinez who
6 operates the belts for BFI from the control room has specifically moved Mendoza to different
7 locations. (Tr. 283:16-284:1.) Mendoza has followed those directions. (Tr. 284:2-4.) BFI did not
8 rebut this testimony.

9 The Regional Director's failure to consider the record evidence that conflicted with the
10 statements of BFI supervisors that they do not direct the work of unit employees, including the BFI's
11 managers own contradictory admissions, and the unrebutted testimony of the Union witnesses was
12 clearly erroneous.

13
14 *b. The Regional Director's Decision Ignores Other Record Evidence that
Establishes BFI's Control Over Unit Employees' Day-to-Day Work*

15 As described above, the Regional Director completely ignored the admissions by Keck, Sutter
16 and Ortiz of the meetings they have held with unit employees and instructions given to the unit
17 employees regarding what to do and how to do it, including what techniques to use and their work
18 speed. (See, e.g., Tr. 146:16-147:3; 145:16-24; 112:17-113:1; 83:3-6; 83:19-21; 84:24-85:1.) The
19 Regional Director also ignored the testimony of Union witnesses that BFI supervisors regularly give
20 them instructions about how to improve productivity by telling them how to do their job differently,
21 by moving faster, prioritizing certain items, not pressing the button to stop the line, instructing them
22 to increase productivity and quality, and even moving employees to different positions. (Tr. 224:22-
23 245:10; 247:12-248:6; 259:10-15; 259:19-23; 246:17-23; 272:7-19; 222:2-6; 222:14-223:10; 282:20-
24 25; 283:10-284:4.) The Regional Director additionally ignored other record evidence establishing
25 BFI's control over the unit employees' daily work.

26 The Regional Director ignored the larger context, the uncontroverted evidence of BFI's
27 integrated operation. The unit employees perform work that is at the core of BFI's business and BFI
28 has a strong interest in controlling the work performed by the unit employees. Indeed, BFI's

1 managers and supervisors are responsible for ensuring that the sorting operation (staffed by unit
2 employees) runs efficiently and productively. (Tr. 81:23-25.) This supports an inference that BFI is
3 exerting control over the daily work of the unit employees. This inference is further strengthened by
4 the evidence that BFI directly supervises the sorter that it employs and who performs the exact same
5 work as the unit employees alongside the unit employees. (Tr.155:4-12.)³ That the BFI sorter is
6 performing in the exact same way as the unit employees suggests that BFI is controlling the manner
7 in which the unit employees work. A finding of BFI's daily control is further strengthened by BFI's
8 admissions that it maintains productivity standards for the unit employees and runs the lines at the
9 speed at which it believes is optimal for the unit employees to shift most efficiently. (Tr. 110:8-
10 111:4.)

11 The Regional Director found, and the evidence from BFI's own witnesses establishes, that
12 BFI controls and maintains the line on which sorters work, including the speed at which the line runs,
13 when the line starts and when the line stops. (Tr. 31:10-17.) BFI, and solely BFI, controls when the
14 line starts and stops and the BFI shift supervisor and the BFI line operator collaborate to determine
15 whether and when to stop the line. (Tr. 41:17-18; 87:3-7.) The Regional Director gave insufficient
16 weight to this evidence, which establishes pervasive BFI control over unit employees' work down to
17 every minute of every work day. Even more problematic is the Regional Director's utter refusal to
18 consider other record evidence establishing BFI's control over unit employees' daily work.

19 i. The Regional Director Ignored the Uncontroverted Evidence that BFI
20 Constantly Monitors Unit Employees' Work and Intervenes When
21 Necessary

21 BFI supervisors and managers are constantly observing and aware of the performance of the
22 unit employees. They spend a significant amount of time actually observing the work of the unit
23 employees, the BFI line operator observes them constantly, and the BFI supervisors, line operator and
24 Leadpoint supervisors are all in contact throughout the shift via walkie-talkie. (Tr. 75:20-22;
25 114:220115:3; 82:23-25; 74:20-22.) An important fact, which the Regional Director ignored is that
26 BFI provides these walkie-talkies to the Leadpoint supervisors so that they can remain in constant
27

28 ³ The Regional Director notes this fact but ignores it in the analysis.

1 contact. (Tr. 39:12-17; 104:17-19.) The Regional Director ignored entirely the evidence presented of
2 BFI's constant oversight of unit work. The constant oversight must be further understood in the
3 context of BFI's integrated operation as ensuring that unit employees performed as BFI expected in
4 terms of productivity and quality. Indeed, as the Regional Director properly found, BFI maintains
5 productivity standards for the unit employees. (Decision, p. 9; see also Tr. 41:19-25; 42:11-16.)

6 BFI then intervenes where it observes issues of productivity or quality. Significantly, BFI
7 supervisor Sutter admits that he adjusts the speeds or make other adjustments to running the line,
8 such as adjusting a screen, or telling workers to work more based on their daily performance. (Tr.
9 111:6-21 .) Supervisor Ortiz likewise admitted on cross-exam to intervene when he observed quality
10 issues to try to motivate unit employees to perform better. (Tr. 84:6-1.) Similarly, it is Keck's
11 dissatisfaction (through his own observations) with unit employees' work that led him to call certain
12 meetings to discuss sorting techniques and set cleanliness standards. (Tr. 147:4-12.) Keck also
13 instructed unit employees directly to clean their areas before going on break because when he first
14 attempted to give these instructions through the Leadpoint supervisors he was unsuccessful. (Tr.
15 296:10-297:5.) The record evidence also shows BFI manager meetings and directions to unit
16 employees regarding how to improve productivity to meet BFI's standards. (See, e.g., Tr. 224:22-
17 245:10; 245:15-21; 246:4-12; 258:12-17; 259:10-23.)

18 BFI's constant monitoring of unit work in conjunction with BFI intervention, when it deems
19 necessary, establishes BFI's control over the unit employees' daily work.

20
21 ii. The Regional Director Ignored the Uncontroverted Evidence that BFI and
Solely BFI Controls Unit Employees' Breaks

22 The Regional Director's finding completely ignores the evidence that BFI, and solely BFI,
23 determines whether and when unit employees have breaks throughout the day. BFI shift supervisors
24 and the BFI line operator collaborate to determine when to stop the line for breaks. (Tr. 41:17-18;
25 87:3-7.) For example, BFI shift supervisors decide whether or not to call a break if the machinery
26 breaks down. (Tr. 89:2-3; 108:23-25.) Leadpoint has no authority over this term and condition of
27 employment and could not bargain over changes to break times for unit employees. This evidence
28

1 was uncontroverted and admitted to by BFI's witnesses. The Regional Director's Decision fails to
2 consider this evidence of control over the unit employees' daily work schedule.

3
4 iii. The Regional Director Ignored and Mischaracterized the Evidence that BFI
Controls Unit Staffing

5 The Regional Director found that "Leadpoint determines how many employees are needed at
6 BFI's plant" and "BFI does not specifically request a certain number of employees, Leadpoint comes
7 up with the number of employees, but adjusts it accordingly as needed." (Decision, p. 11.) This
8 finding is directly contrary to the record evidence. In fact, BFI Manager Carl Mennie and BFI
9 supervisor John Sutter both testified that every day BFI gives Leadpoint the target headcount (or
10 number of employees) that BFI has decided that it needs that day. (Tr. 36:4-12; 105:17-21.) BFI
11 Manager Mennie and Leadpoint CEO Ramirez both testified that Leadpoint complies with the target
12 headcount dictated by BFI and does not supply more employees. (Tr. 36:13-19; 165:1-6.)

13 It is uncontroverted, as the Regional Director properly found, that BFI dictates the shift times
14 of the unit employees, as determined by Keck. (Decision, p. 11; see also Tr. 39:18-20; 140:19-141:2.)
15 It is undisputed that Leadpoint has no authority to change the shift times. (Tr. 148:6-11.) The
16 Regional Director, however, found that BFI does not control the schedules of unit employees. This
17 finding ignores reality. Leadpoint cannot bargain over changes to the shift changes. BFI further
18 controls the holidays that the facility is closed; Leadpoint cannot decide to provide its employees a
19 different holiday on a day that BFI is open. (Tr. 179:4-10.)

20 The record evidence also establishes that BFI determines if a particular line is going to keep
21 running at the end of the scheduled shift and run overtime. (Tr. 37:5-7; 38:9-12.) Leadpoint has no
22 control over this decision and this decision dictates whether unit employees work overtime. The
23 Regional Director found that, nevertheless, this is insufficient control to codetermine the issue of
24 overtime because Leadpoint decides which particular employees stay to work overtime. The record
25 evidence does not bear out this conclusion; it is merely speculation. In reality, Leadpoint did not
26 necessarily even know which lines were working overtime ahead of time; they just keep running so
27 the unit employees just have to keep working, per BFI's expectations. (Tr. 274:21-275:20.)
28

1 Importantly, Leadpoint cannot approve or authorize overtime separately or independently from BFI.

2
3 iv. The Regional Director Completely Ignored the Evidence of BFI's Control
4 Over the Daily Work of the Non-Sorter Unit Employees

5 The record evidence establishes that BFI directly controls the work of the non-sorter unit
6 employees. Travis Stevens gave un rebutted testimony that he had recently worked as a maintenance
7 helper approximately two to three weeks prior to the hearing. During that time he received directions
8 solely from BFI. (Tr. 214:13-20.) While working as a maintenance helper he was instructed as to
9 what to do by BFI mechanic Pablo or BFI shift supervisor Ortiz and received no direction or
10 oversight from Leadpoint supervisors. (Tr. 241:13-20; 242:11-15.) Stevens gave un rebutted
11 testimony that he was trained as a maintenance helper by BFI. When Stevens was placed in that
12 position he did not know how to repair any machinery and he was shown how to fix the machines by
13 BFI. (Tr. 241:22-242:10.) Stevens worked to repair the machines, as directed by BFI, and in
14 accordance with how BFI trained him to fix the machines. (Tr. 242:16-18.) If Stevens did not know
15 how to fix a machine or had a question about how to perform his job, he would go to BFI. (Tr.
16 242:19-22.) While working as a maintenance helper, he worked alongside BFI employees. (Tr.
17 243:18-20.) BFI manager admitted that mechanics work alongside unit employees, who provide
18 assistance to the BFI mechanics. (Tr. 32:21-34:16.) Stevens gave un rebutted testimony that when he
19 works on Saturdays he receives instructions throughout the day from BFI employees. (Tr. 249:1-8;
20 266:20-267:9.) The Regional Director ignored this un rebutted testimony in its entirety without
21 explanation.

22 The Union also presented un rebutted testimony by Clarence Harlin, who works in
23 housekeeping. He estimated that he receives directions from BFI directly at least a couple of times
24 per week. (Tr. 217:23-218:11.) Harlin testified that Keck has instructed him to clean the fence line
25 and this has become part of his job duties. (Tr. 229:7-13.) The Regional Director's failure to consider
26 this un rebutted evidence is clear error.
27
28

1 c. *The Regional Director’s Conclusion Is Based on Other Findings Unsupported by*
2 *the Record Evidence*

3 i. The Regional Director’s Finding that BFI Lacks Authority to Decide
4 Where a Leadpoint Employee Is Assigned Is Not Supported in the Record

5 The Regional Director found that “BFI has no authority over the particular employees who
6 work on the material streams or the authority to decide where a Leadpoint employee is assigned.”
7 (Decision, p. 9.) No witness testified that BFI had *no* authority to decide where a Leadpoint employee
8 is assigned. Such a finding is directly contradicted by the record evidence. BFI has dictated where
9 sorters work through its lines and stations along those lines and daily headcount. (Tr. 15:23-16:3;
10 187:1-5.) The Regional Director completely omits any reference to the uncontradicted record
11 evidence that BFI has constructed stations along the sorting lines for unit employees to stand, thereby
12 dictating exactly where the unit employees stand during their shift, in addition to whether they are
13 performing work every minute of the shift. (Tr. 15:23-16:3; 187:1-5.)

14 The record evidence also shows that the week prior to the hearing, BFI Manager Paul Keck
15 instructed Leadpoint to reduce by two sorters per shift the number of employees on a particular line
16 and then instructed Leadpoint as to the positions of the remaining sorters on that line and their duties.
17 (Tr. 54:5-15.) This was confirmed by documentary evidence. (Union Exh. 1.) The Regional Director
18 simply ignored this evidence and failed to explain the basis of the finding that BFI had “no authority”
19 over the unit employees in light of this uncontroverted evidence.

20 Most compelling is the uncontroverted testimony of Marivel Mendoza that BFI has directed
21 specific sorters to move from one line to another. (Tr. 282:20-25; 283:13-15.) Mendoza has followed
22 those directions. (Tr. 283:10-12.) Similarly, David Martinez who operates the belts for BFI from the
23 control room has specifically moved Mendoza to different locations. (Tr. 283:16-284:1.) Mendoza
24 has followed those directions. (Tr. 284:2-4.) Even the Leadpoint supervisor admitted in response to a
25 non-leading question that BFI supervisors or control room operators will advise sorters to move to a
26 different time, before contradicting his testimony after prompting through leading questions from his
27 attorney. (Tr. 211:16-18.) In addition, Stevens testified that a Leadpoint supervisor informed him that
28 his position was being changed at the request of BFI. (Tr. 255:9-21.)

1 Even presuming the record evidence supported the Regional Director's conclusion that BFI
2 had no authority to assign individual unit employees, BFI ultimately controls these assignments
3 through its daily headcount and machine operation decisions, including the number of employees that
4 staff any given line.

5 ii. The Regional Director's Finding that BFI Does Not Control How
6 Leadpoint Supervisors Address Problems Is Not Supported by the Record
7 Evidence

8 The Regional Director erroneously found that if a problem arises with a unit employee, that
9 BFI supervisors and managers will contact a Leadpoint supervisor inform them of the issue and *not*
10 tell them how to fix the problem. It is contrary to the admissions of BFI's own managers. Sutter, for
11 example, admitted that he will tell unit employees (relayed through Leadpoint supervisors) to pick
12 more or increase their speed. (Tr. 111:6-21.) Ortiz likewise admitted that he has given specific
13 instructions to unit employees through Leadpoint supervisors as to what unit employees should do.
14 (Tr. 86:8-18.) Similarly, Union Exhibit 1, is an example of a BFI-identified problem related to the
15 productivity of a line and a specific instruction to Leadpoint as to how to deal with it, by reducing the
16 numbers of employees on that line by two and distributing work exactly as directed by BFI.

17 Moreover, it is contrary to Sutter's testimony in which he admitted that BFI initially trained
18 Leadpoint supervisors and unit employees as to how to perform their job for approximately one
19 month. (Tr. 102:6-15.)⁴ Sutter explained that BFI has specifically trained the Leadpoint supervisors
20 as to *how* to deal with particular issues that arise. (Tr. 115:4-22; 116:5-11.) For example, BFI has
21 trained Leadpoint supervisors and, through Leadpoint supervisors, unit employees on how to clear
22 jams (Tr. 115:24-116:4) and when to use the emergency stop. (Tr. 103:10-13; 103:19-22.) Because
23 BFI has already trained Leadpoint supervisors on exactly how to address various problems, BFI
24 supervisors can now point out a problem to Leadpoint supervisors and they will handle it in
25 conformance with BFI's expectation. Thus, when Sutter identifies a specific problem on a line, like

26 ⁴ The Regional Director found that the *only* time BFI trained unit employees was when it opened the
27 facility in 2009. (Decision, p. 10.) Keck, however, admitted to recently holding "educational"
28 meetings with unit employees. Sutter, Ortiz and Keck admitted to recently holding safety trainings
with unit employees. The Union witnesses affirmed attending training meetings conducted by BFI
supervisors.

1 too much plastic, he expects Leadpoint to deal with it in the BFI-trained and approved manner. (Tr.
2 99:1-10.) The Regional Director ignores this history entirely and elevates form over substance
3 finding that, apparently, because BFI does not continue to give the same direction to Leadpoint
4 supervisors, that they are no longer directing them on how to handle a problem and are merely
5 pointing it out. This is a perverse reading of the record.

6 In reaching this finding, the Regional Director also ignored the evidence that BFI meets with
7 Leadpoint supervisors prior to each shift to ensure that the unit employees accomplish what BFI
8 wants them to dictate what lines will be run and coordinate what is going to be executed that day. (Tr.
9 75:6-10; 107:10-16.) In other words, BFI is controlling the bargaining unit work each shift through
10 the Leadpoint supervisors. The Regional Director's conclusion also ignores BFI's extensive
11 monitoring and intervention to ensure that unit employees are performing up to BFI's standards.

12
13 iii. The Regional Director's Finding that BFI Does Not Control the Speed of
the Unit Employees' Work Is Not Supported by the Record Evidence

14 While the Regional Director admits that BFI sets productivity standards that apply to the unit
15 employees, (Decision, p. 9; see also Tr. 41:19-25; 42:11-16), and controls the speed of the line to
16 meet these productivity standard, the Regional Director dismisses this evidence of control by finding
17 that BFI "does not control or enforce the speed at which unit employees work in response to these
18 speed changes." (Decision, p. 9.) The Regional Director's distinction is illogical and wholly divorced
19 from reality. The Regional Director has essentially found that the speed at which the assembly line
20 runs has no impact on the speed at which the workers on the assembly line work. If the speed at
21 which BFI ran the line had no impact on the speed at which unit employees worked, then why would
22 BFI bother changing the speeds at all, why would BFI monitor the work of the unit employees and
23 respond accordingly with direction or changes to the speed, as is admitted by BFI supervisors. The
24 BFI supervisors intervene when there is problem with quality or productivity of the unit employees'
25 work which may include adjusting line speeds. (Tr. 111:16-21.) The Regional Director's finding is
26 also contrary to the record evidence that BFI supervisors have directly told unit employees to speed
27 up and have given those same directions through Leadpoint supervisors.

1 2. The Regional Director Ignored and Mischaracterized the Evidence that BFI Controls Unit
2 Employees' Wages

3 The agreement between BFI and Leadpoint restricts the unit employee wage rates. (Decision,
4 p. 5; see also Jt. Exh. 1, p. 1; Tr. 179:11-17.) The Regional Director ignored the evidence presented at
5 hearing about the single instance of an increase to the wage scale of the unit employees. This wage
6 increase in March 2013 occurred only after Leadpoint and BFI entered into an agreement to change
7 the rate schedule. (Union Exh. 3; Tr. 176:3-8.) Unit employees have been told by Leadpoint that
8 raises are out of Leadpoint's control (Tr. 176:9-19; 226:1-6.)

9 The Union also presented evidence that BFI manager Paul Keck intervened to take away the
10 raise for a unit employee. (Tr. 224:12-16; 293:7-11; 295:16-20.) The Regional Director characterized
11 this as "simply inform[ing] Leadpoint of this incorrect differential pay because BFI was being billed
12 the incorrect amount." (Decision, p. 6.) This conclusion does not make sense. The facts relied on
13 establish that the wages for each individual unit employee are negotiated with and codetermined by
14 BFI. The Regional Director reasoned that since there is nothing forbidding Leadpoint from
15 negotiating to lower unit employee wage rates, there is insufficient evidence that BFI codetermines
16 wage rates. (Decision, p. 15.) This reasoning is not supported by any legal authority. BFI controls and
17 is necessary in order to bargain over an increase to wages. The unit employees make the minimum
18 wage (Union Exh. 3) and even if they made more than the minimum, the Union is not in the business
19 of negotiating with employers who only have authority to negotiate over wage decreases.

20 3. The Regional Director Ignored the Evidence that BFI Sets and Enforces Work Rules
21 Applicable to the Unit Employees

22 The agreement between BFI and Leadpoint specifically authorized BFI to make and enforce
23 work rules. BFI, in fact, has set and enforced various work rules for the unit employees. BFI has rules
24 as to when the unit employees can use the emergency stops on the line that BFI supervisors have
25 communicated to unit employees. (Tr. 41:6-9; 88:2-9; 103:2-13; 103:19-22.) BFI monitors
26 compliance and follows up with unit employees. (Tr. 103:23-104:9; 245:1-21.) The Regional Director
27 ignored this evidence, including of direct intervention with unit employees.

28 The Regional Director ignored the evidence that BFI has held safety meetings directly with
unit employees regarding its rules. (Tr. 135:4-16; 273:2-9.) BFI, for example, has enforced against

1 unit employees, its alcohol-free workplace rule. (Union Exh. 2; Tr. 58:13-25 (commenting that an
2 email from BFI-management requesting dismissal of unit employees, “reinforces our standards on
3 worksite safety and alcohol.”) It is significant to the joint employer finding that BFI has enforced its
4 work rules against unit employees.

5 The Regional Director also ignored the uncontroverted evidence of BFI’s implementation and
6 enforcement of a new work rule. BFI expects unit employees to keep their work areas clean. (Tr.
7 112:6-8.) BFI has instructed, through the Leadpoint supervisors, that unit employees clean up their
8 areas before they go to break and after the belt stops. (Tr. 112:9-12; 273:11-15; 284:17-285:3; 296:2-
9 7.) Keck explained, “I wanted to make it very clear, this is a cultural change in that -- or condition
10 change. I think the condition was that when they -- the bell rang, everybody just simply abandoned
11 their worksite and headed off to take their break. And we needed to recondition to simply stop,
12 collectively gather up the debris that was on the ground.” (Tr. 296:10-15.) Keck explained that he
13 gave this message directly because he had tried delivering it through the Leadpoint supervisors,
14 however, the directions had not been followed. (Tr. 296:23-297:5.) Ortiz has likewise enforced this
15 work rule. (Tr. 245:13-15; 257:9-15; 270:11-23.)

16 The Regional Director also ignored the evidence that BFI maintains cameras at the facility on
17 which it videotapes unit employees. (Tr. 208:8-19.) The cameras are not controlled in any way by
18 Leadpoint. BFI has used these cameras for disciplinary purposes to secure dismissal of a unit
19 employee from work at the BFI facility. (Union Exh. 2.)

20 BFI’s control over and enforcement of work rules is a factor establishing joint employer
21 status. Given the reservation of right to BFI, Leadpoint cannot effectively bargain over work rules.

22 **B. The Regional Director’s Erroneous Factual Findings Were Prejudicial**

23 By failing to consider the full factual record, the Regional Director erroneously concluded
24 that BFI does not co-determine matters governing essential terms and conditions of employment. On
25 the full record it is clear that BFI jointly employs the unit employees by virtue of its almost total
26 control over the unit employees work on a daily basis, including control over how the work is done,
27 constant supervision and direction of the unit employees, and control over other significant terms and
28 conditions of employment. Simply, BFI supervises and directs unit employees. In addition, the full

1 record establishes BFI's control over other terms and conditions of employment including wages,
2 hours, work rules and termination.

3 1. BFI's Control Over *How* the Work Is Done Establishes Its Joint-Employer Status

4 The bargaining unit employees work on BFI's machinery. Leadpoint does not own or control
5 these machines. BFI has created the jobs that are filled by Leadpoint and, in doing so, dictated how
6 such jobs are performed. BFI has created the stations where the Unit employees work, thus dictating
7 where the Unit employees stand and exactly what function they perform in that location. BFI dictates
8 the number of employees on each line and has recently decreased that number as to particular line to
9 attempt to get increased productivity from the unit employees. BFI, not Leadpoint, controls the
10 machinery and headcount. Therefore, Leadpoint cannot take action to increase the staffing to
11 decrease the workload or change or combine duties. Moreover, BFI's control over the speed of the
12 line dictates the manner in which the work is done by controlling how fast the work is performed.

13 BFI manager John Sutter explained that BFI has explicitly trained the unit employees. When
14 BFI reopened with its new machinery, it trained all of the unit employees in how to perform the
15 work, including what to pull off the line and how to fix a jam. The training as to how to perform the
16 work is significant.

17 Moreover, that training has continued to this day. BFI managers regularly direct the Unit
18 employees in how to perform the work, both directly and through the Leadpoint supervisors. BFI has
19 instructed the Unit employees on techniques to use. Keck has admitted to six such recent meetings
20 with the wet line employees to review techniques. BFI has instructed the Unit employees on the
21 priority for picking. BFI has instructed the Unit employees on whether and when (i.e. how) to use the
22 emergency stop buttons. The employee testimony on these specific instructions went unrebutted
23 despite the availability of Sutter and the recalling of Keck on rebuttal. The failure of these witnesses
24 to dispute this testimony despite the opportunity creates an inference of confirmation. Importantly,
25 the BFI managers themselves admit that they intervene when they see a quality issue which will
26 sometimes cause them to retrain. The evidence establishes that BFI also directs sorters as to what
27 lines to work on and moves them from line to line. Marivel Mendoza gave unrebutted testimony that
28 BFI Manager John Sutter and the BFI line operator have moved her from one line to another.

1 Sutter did not rebut this testimony. Therefore, it should be credited. This direction, given directly to
2 bargaining unit employees, impacts their job duties and the difficulty of the work they are assigned
3 These kinds of instructions go beyond setting the final parameters of the work, they are the heart of
4 the work.

5 BFI's pre-shift meetings with the Leadpoint supervisors, constant communication through
6 BFI-provided walkie-talkie's with the Leadpoint supervisors, and BFI's admitted training and use of
7 Leadpoint supervisors as intermediaries, is evidence of BFI's monitoring and preparedness to
8 intervene to ensure the work is performed in conformance with BFI's expectations. The admissions
9 of BFI managers that they are responsible for the productivity of the line and BFI's productivity
10 standards for the line are further evidence that BFI exercises control over these employees.

11 Further, the fact that the BFI-employed sorter works side-by-side with the Unit employee and
12 works in the exact same fashion is strong evidence that it is BFI that is dictating *how* the work is to be
13 done.

14 BFI's control over the unit employees' work is ever present. The work that the unit employees
15 perform -- and how they perform it -- is central to BFI's core business. As such, BFI carefully
16 controls the performance of this work by dictating the positions of the unit employees, the numbers of
17 unit employees, the shift hours of unit employees, the speed at which the unit employees work, the
18 productivity standards for the unit employees and whether, when and for how long the unit
19 employees take breaks. BFI monitors the work of the unit employees throughout the day directly
20 through its employees and supervisors and stays in constant communication via BFI-provided walkie-
21 talkies provided to Leadpoint supervisors. BFI starts each shift with a meeting with Leadpoint
22 supervisors to dictate the work of unit employees. BFI trained Leadpoint supervisors and unit
23 employees as to how to perform the work. BFI polices the quality and productivity of the unit
24 employees and intervenes when it is subpar, according to BFI. These interventions may be through
25 direct instruction, training meetings, or through direction to supervisors.

26 Similarly, the uncontroverted evidence also establishes that BFI directly supervises and
27 directs the maintenance helpers. The maintenance helpers are trained by BFI as *how* to clean various
28 machines. The maintenance helpers are given direction throughout the day by BFI as to what to do

1 and how to do it. If a maintenance helper has a question about the work, they speak to BFI, not
2 Leadpoint. Again, the testimony establishing these facts was unrebutted and should be credited. With
3 respect to the housekeeping positions, the evidence is that BFI changed the job duties by assigning
4 different cleaning tasks and regularly directs these employees.

5 Cases relied on by the Regional Director are distinguishable. Here, the direction is not merely
6 what to do, but how to do it - and the how is being continuously refined. This important factor weighs
7 heavily in favor of finding joint employer status

8 Board law emphasizes even routine supervision as a vital component of joint-employer status.
9 In *Quantum Resources Corp.*, 305 NLRB 759, 760 (1991), the Board found joint-employer status
10 based on the fact that the putative joint-employer “closely and routinely” supervised unit employees
11 through the constant presence of site superintendents and the high degree of detailed awareness and
12 control of the employees’ daily activities. Similarly, in *Heileman Brewing Co.*, 290 NLRB 991, 999
13 (1998), the ALJ and Board in finding joint-employer status noted that the supervisory personnel
14 “supervised and directed the work of the employees to the extent that it determined that such
15 supervision and direction were necessary.”

16 Here, BFI exercises near total control over the daily activities of the bargaining unit
17 employees. It is undisputed that BFI has set the shift times for these employees. It is undisputed that
18 BFI, and solely BFI, controls the line along which the sorters work. Thus, BFI dictates for every
19 minute of every day whether these employees are working, or not. BFI, and solely, BFI, decides
20 whether and when to call breaks throughout the day. If BFI does not stop the line for a break, the
21 bargaining unit employees keep working.

22 At every minute of the shift, BFI’s line operator can visually observe the work of the
23 bargaining unit employees. For a large percentage of the day, the BFI managers are directly
24 observing bargaining unit work. When the BFI managers are not directly observing bargaining unit
25 work, they are in walkie-talkie communication with the BFI line operator and the Leadpoint
26 supervisors. Thus, BFI management is overseeing and monitoring the bargaining unit work (directly
27 or through its agents) every minute of every shift.
28

1 BFI's management is constantly checking the performance of the workers and the quality of
2 the work. When BFI managers see that the performance or quality is subpar, BFI either intervenes
3 directly or intervenes through Leadpoint management. Either way, BFI is exercising pervasive
4 control over bargaining unit employees' work, similar to that in *Hamburg Industries*, where the
5 putative joint employer monitored the performance and communicated instructions through the
6 supervisors of the other. 193 NLRB 67, 68 (1971). Moreover, the fact that BFI's interventions and
7 directions are routine but not constant is immaterial. As in *Heileman*, the critical fact is that BFI
8 intervenes where necessary.

9 The evidence of the pervasiveness of BFI's daily control over the bargaining unit employees
10 is strikingly strong and this factor, standing alone supports a joint employer finding.

11 In the cases relied upon by the Regional Director, the putative joint-employer did not exert
12 anywhere near the control over the daily activities present here. *Cf. G. Wes Ltd. Co.*, 309 NLRB 225,
13 226 (1992) (finding no joint employer status because there was no instruction as to the manner in
14 which the certified asbestos abatement workers were instructed to perform tasks and the work was
15 left to them to perform without supervisions); *Lareco Transp.*, 269 NLRB 324 (1984) (lack of day-to-
16 day supervision as absence of oversight of drivers during daily tasks).

17 The cases relied on by the Regional Director are readily distinguishable. Those cases involve
18 instances of minimal and routine supervision. *TLI, Inc.*, 27 NLRB 798 (1984) and *Lareco*
19 *Transportation*, 269 NLRB 324 (1984), both involved truck drivers who by the very nature of their
20 work are away from the facility and away from the direct supervision of the putative joint employer.
21 In both cases, the employees retained significant independence and autonomy from the putative joint
22 employer. Here, in contrast, BFI's supervisors are constantly supervising the work of the unit
23 employees directly or through the BFI-supplied walkie-talkies. The BFI supervisors are responsible
24 for the productivity and quality of the unit employees' work. Thus, BFI has set productivity standards
25 and enforces them through monitoring, training and direct instruction, including to reassign the tasks
26 of unit employees and to advise as to how to perform their work. In *TLI*, the Board found significant
27 that the drivers themselves controlled their assignments. Here, the evidence establishes that BFI
28 reassigns unit employees to tasks and assignments.

1 Importantly, here, BFI's supervision and direction of unit employees is not limited to where a
2 job is performed (i.e. the driver's route, as in *TLI* and *Lareco*, relied on by the Regional Director).
3 Instead, the supervision and direction is aimed at *how* the unit employees perform their jobs. BFI
4 directs sorters as to what to do, what materials to prioritize and select, the techniques to use, and
5 whether and when to slow the line. BFI monitors compliance with these standards and enforces them
6 both directly and indirectly. BFI recently required unit employees to start cleaning their areas before
7 they leave for break and is enforcing this new work rule. BFI solely directs unit employees working
8 as maintenance helpers, including training them on *how* to fix machines and directing them
9 throughout the day.

10 The Regional Director relies heavily on *Southern California Gas Co.*, 302 NLRB 45 (1991).
11 That case is likewise distinguishable. There the client company contracted with a subcontractor to
12 perform janitorial services to clean its facility. The manner in which these services were performed
13 were not important to the client and were not dictated by or monitored by the client company. Here,
14 in contrast, the manner in which the sorters perform their work is crucial to BFI and, therefore, BFI
15 has conducted training, monitors unit employees' work and intervenes where necessary by giving
16 direction, holding trainings, changing the speed of the line on which unit employees work or moving
17 workers around. Also significant in *Southern California Gas*, though ignored by the Regional
18 Director, was the fact that the Union and the subcontractor janitorial company had a long history of
19 collective bargaining with collective bargaining agreements that were negotiated without the client
20 company and there was no evidence that the client company's absence effected the bargaining
21 process.

22 The more analogous case is *Pacific Mutual Door Co.*, 278 NLRB 854 (1986). In that case the
23 contracting company was found to be a joint employer because its ultimate direction over the
24 supervision over the employees and control over their conduct in operating its vehicles. In *Pacific*
25 *Mutual*, the subcontractor provided direct supervision but, like here, it was subject to the direction of
26 the contracting company. Here the evidence of BFI control over the work performed by unit
27 employees is even stronger and more pervasive.

1 The instant case also parallels those facts found material in *Manpower, Inc.*, 164 NLRB 287
2 (1967). There, the Board found the existence of a joint employer relationship. *Manpower, Inc.* (as
3 Leadpoint) was solely responsible for hiring, making required payroll deductions and providing
4 workers' compensation insurance; while Armour (as BFI) had, and exercised, the authority to assign,
5 direct and supervise the daily work of Manpower's employees.

6 Because the Regional Director erroneously found that "BFI does not mandate how many
7 Leadpoint employees work on the line, the speed in which the Leadpoint employees work, where
8 they stand on the material stream, or even how they pick material and contaminates off of the
9 material stream," (Decision, p. 17) the Regional Director misapplied the applicable law and
10 erroneously concluded that BFI does not supervise or direct the day-to-day work of the unit
11 employees. On this same basis, the Regional Director erroneously distinguished *Quantum Resources*
12 *Corp.*, 305 NLRB 759 (1991) and *Heileman Brewing Co.*, 290 NLRB 991 (1980).

13 BFI's constant supervision and direction over the manner in which unit employees work is
14 sufficient to establish joint employer status. This conclusion is strengthened by BFI's authority over
15 unit employees' wages, hours and other terms and conditions of employment.

16 2. BFI's Control Over Who Works at the Facility Establishes Its Joint-Employer Status

17 The contract between BFI and Leadpoint reserves the authority to BFI to reject any Unit
18 employee or discontinue the use of any Unit employee for "any reason." (Jt. Exh. 1.) BFI has on three
19 occasions prompted the dismissal of a Unit employee from BFI. On all three occasions, Leadpoint
20 complied. This fact alone is significant enough to establish joint-employer status. Failure to include
21 BFI would render Leadpoint and Petitioner unable to negotiate over a just cause provision in a
22 collective bargaining agreement.

23 This has been a significant factor in finding joint-employer status in several cases. *See, e.g.*,
24 *Boire v. Greyhound Corp.*, 376 U.S. 473, 475 (finding that while the one employer discharged
25 employees, the putative joint employer had prompted the discharge of one employee that it regarded
26 as unsatisfactory); *Holyoke Visiting Nurses Ass'n*, 310 NLRB 115 (1993) (finding joint employer
27 status in part because the putative joint employer had the right to refuse to accept the services of
28 employees it did not want, and could effectively recommend the removal of such employees from

1 its premises); *see also Pacific Mutual Door Co.*, 278 NLRB 854, 858 (1986) (finding joint employer
2 status in part because the contracting employer retained ultimate authority over selection and on one
3 occasion told the subcontractor that it no longer wanted a particular driver and he was no longer
4 assigned); *Hamburg Indus.*, 193 NLRB 67, 68 (1971) (noting that the joint employer retained the
5 right to remove employees from its plant); *Cf. G. Wes Ltd. Co.*, 309 NLRB 225 (1992) (finding no
6 joint employer status in part because contracting entity had no right to reject any employee assigned
7 by the subcontractor).

8 The Regional Director finds that because BFI's authority is to dismiss a Unit employee from
9 work on its premises as opposed to all Leadpoint work, that BFI does not exercise sufficient control
10 over firing. This finding is contrary to the reasoning in *Holyoke* and the above-cited cases. That BFI
11 can dismiss an employee from bargaining unit work and work on the premises is sufficient control
12 over terms and conditions of employment to establish a joint employer relationship. The Regional
13 Director's reasoning is in tension with the purpose of the Act to permit meaningful collective
14 bargaining with the entity that actually controls the terms and conditions of employment, which
15 fundamentally includes who can perform bargaining unit work.

16 Further, BFI sets the total number of bargaining unit employees employed on any given day.
17 Leadpoint cannot and does not decide to utilize more persons than the daily BFI headcount. This has
18 been a factor in finding join employer status. *See, e.g., D&F Indus.*, 399 NLRB 618, 640 (2003);
19 *Pacific Mutual Door Co.*, 278 NLRB 854, 858-59 (1986); *Boire v. Greyhound Corp.*, 376 U.S. 473,
20 475 (1964).

21 BFI also maintains control over hiring criteria and specifically requires a drug test of all Unit
22 employees. BFI retains the right to reject personnel supplied by Leadpoint. These facts were ignored
23 by the Regional Director but should be considered in the joint employer analysis.

24 The full record establishes that this factor weighs heavily in favor of finding joint employer
25 status.

1 3. BFI's Meaningful Control Over Other Terms and Conditions of Employment Establishes
2 Its Joint-Employer Status

3 The exercise of control over the number of hours that unit employees work is a significant
4 factor in establishing joint employer status. *See D&S Leasing*, 299 NLRB 658, 671 (1990); *Pacific*
5 *Mutual Door Co.*, 278 NLRB 854, 859 (1986) *Quantum Resources Corp.*, 305 NLRB 759, 760-61
6 (1991).

7 BFI exercises meaningful control over the hours worked by the bargaining unit employees.
8 BFI dictates the shift times. BFI controls unit employees' breaks throughout the day. BFI exclusively
9 decides whether lines will run overtime. This decision is communicated to the bargaining unit
10 employees through the Leadpoint supervisors but Leadpoint has no control over whether overtime
11 will be worked, for how long, or when the bargaining unit employees will find out they are working
12 overtime. Leadpoint cannot assign the bargaining unit employees to work overtime without prior
13 approval from BFI. BFI reviews and approves the number of overtime hours worked by the
14 bargaining unit employees.

15 The Regional Director emphasizes that because BFI does not name individually the
16 bargaining unit employees who will work overtime, it does not co-determine hours of work. This
17 distinction is meaningless on the recyclery floor. BFI determines which lines will be working
18 overtime and those are the bargaining unit members who work overtime. There is often no time or
19 opportunity for Leadpoint to shuffle around employees to work overtime based on some other criteria
20 if it were so inclined and there is no evidence in the record that Leadpoint does so. Leadpoint is not in
21 control of the overtime determination and cannot even recommend overtime. BFI also controls the
22 holidays for unit employees. The Union and Leadpoint simply cannot bargain meaningfully over
23 hours without BFI's participation.

24 BFI has set a maximum ceiling for the wage rates of unit employees. In addition, as a
25 practical matter, Leadpoint must get consent from BFI to raise unit employee wages as BFI pays
26 Leadpoint by a percentage overage of each wage rate. Indeed, the one time that the wage scale was
27 raised was only after BFI and Leadpoint negotiated a change to their contract. Further, BFI regularly
28 reviews the wages paid by Leadpoint and the evidence shows intervened successfully to get the wage
29 rate of one employee lowered. The Union and Leadpoint cannot bargain over wages except (as the

1 Regional Director reasons) to bargain to lower wages. The Regional Director ignored the evidence of
2 BFI's role in changing unit employees' wages. Bargaining unit employees seeking to increase their
3 wages have been unable to get clear answers from Leadpoint and have been told that no increase is
4 possible without an increase to Paul Keck's budget. This highlights the necessity of including BFI as
5 a joint employer to effectuate the purpose of the Act.

6 BFI sets and enforces work rules for unit employees. BFI monitors the behavior of unit
7 employees for conduct not permitted on its watch. BFI has dismissed from employment at its facility
8 three Unit employees for failing to meet its work rules. BFI has enforced new work rules regarding
9 cleaning. BFI also maintains the facility and uses cameras, which on at least one occasion has led to
10 discipline of a unit employee.

11 In conclusion, joint employer status is a totality of the circumstances calculation. The joint
12 employer need not exercise the full panoply of employer power. The above evidence is more than
13 sufficient to establish BFI's joint employer status.

14
15 **C. In the Alternative, the Board's Standard for Establishing Joint Employer Should Be Reconsidered**

16 As Wilma Liebman has recognized in several concurring opinions, the purpose of the Act is
17 furthered where joint-employer status is found more broadly, so that employees are not prevented
18 "from bargaining with the company that, as a practical matter, determines the terms and conditions of
19 their employment." *In re Airborne Freight Co.*, 338 NLRB 597 (Liebman, concurring).

20 Such a broader approach would suggest finding joint-employer status where the putative
21 joint-employer exercised "indirect control" over the contractor's wages and discipline, *Hoskins*
22 *Ready-Mix Concrete*, 161 NLRB 1492 (1966); where the respondent had contractual authority to
23 control some employment conditions, even if that authority was not exercised, *Jewel Tea Co.*, 162
24 NLRB 508 (1966); where "industrial realties" made one company a "necessary party to meaningful
25 collective bargaining," even though it played no role in hiring, firing, or directing employees, *Jewell*
26 *Smokeless Coal*, 170 NLRB 392 (1968), *enfd.* 435 F.2d 1270 (4th Cir. 1970); and where the putative
27 joint employer "was the ultimate source of any wage increases for [the contractor's] employees that
28

1 might be negotiated with a union.” *Hoskins Ready-Mix Concrete*, 161 NLRB 1492 (1966). Under any
2 of these broader formations, BFI is a joint-employer.

3 Meaningful collective bargaining requires that BFI sit down at the table. BFI dictates the
4 operational requirements, monitors and retains effective control over those operations, which
5 manifests in BFI control over when employees work throughout the day, how they work, how fast
6 they work, and what rules they follow when working. Without BFI, there can be no meaningful
7 bargaining over wages, as BFI has set a maximum rate for pay and the rates paid to Leadpoint are
8 based on the bargaining unit employees’ wages. Any attempted negotiation over wages would be
9 futile or result in a cancelled contract. Similarly, without BFI, there can be no meaningful bargaining
10 over job protection as BFI has reserved the right to reject or discontinue the employment of any
11 bargaining unit employee for any reason. The bargaining unit employees must be able to bargain with
12 the employer that provides a substantial proportion of the capital made productive by the employees.
13 *See* Michael Harper, *Defining the Economic Relationship Appropriate for Collective Bargaining*, 39
14 Boston College L. Rev. 329, at 344-356 (1998).

15 The Board’s flawed standard permits “the restructuring of employment through the injection
16 of a contractor between the client and the employees utterly insulates the client from the basic legal
17 obligation to recognize and bargain with the employees’ representative.” Craig Becker, *Labor Law*
18 *Outside the Employment Relation*, 74 Tex. L. Rev. 1527, 1543 (1996).

19 A broader standard is more consistent with the joint employer analysis used in the context of
20 the Fair Labor Standards Act and state labor laws, which recognize that the concept of joint
21 employment should be defined expansively. *Torres-Lopez v. May*, 111 F.3d 6333, 639 (9th Cir.
22 1997); *see also Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir.1979) (noting in
23 joint employment case that “[c]ourts have adopted an expansive interpretation of the definitions of
24 ‘employer’ and ‘employee’ under the FLSA, in order to effectuate the broad remedial purposes of the
25 Act”). Therefore, to determine if a joint employment relationship exists under the FLSA, the federal
26 courts have applied an “economic reality” test. *Bonnette v. California Health & Welfare Agency*, 704
27 F.2d 1465, 1470 (9th Cir.1983); *Real*, 603 F.2d at 754. A court should consider all those factors
28 which are “relevant to [the] particular situation” in evaluating the “economic reality” of an alleged

1 joint employment relationship under the FLSA. *Bonnette*, 704 F.2d at 1470. In addition, the federal
2 courts consider the ownership of the premises and equipment, whether the service rendered is an
3 integral part of the business, and whether the work required initiative or judgment or provided the
4 opportunity for profit or loss. Considering these factors, BFI is clearly a joint employer because BFI
5 exercises considerable control over the bargaining unit employees who render services integral to
6 BFI's business and BFI has made a significant investment in capital. The economic realities of the
7 situation dictate that BFI is a joint employer.

8 The Board should return to a broader approach to defining a joint employer to remain
9 consistent with the Act's goal of promoting collective bargaining.

10 IV. CONCLUSION

11 For the foregoing reasons, the Union respectfully requests the Board vacate the Decision and
12 Direction of Election of the Regional Director and order a new direction for an election among the
13 unit employees jointly employed by BFI and Leadpoint.

14 Dated: September 3, 2013

BEESON, TAYER & BODINE, APC

16 By: 

SUSAN K. GAREA

Attorneys for Teamsters Local 350

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

I declare that I am employed in the County of Alameda, State of California. I am over the age of eighteen (18) years and not a party to the within cause. My business address is Beeson, Tayer & Bodine, 483 Ninth Street, 2nd Floor, Oakland, California 94607. On this day, I served the foregoing document:

**CORRECTED REQUEST FOR REVIEW OF THE REGIONAL
DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

☒ By Mail to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(a), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At Beeson, Tayer & Bodine, mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business in a United States mailbox in the City of Oakland, California.

☐ By Personal Delivering a true copy thereof, to the parties in said action, as addressed below in accordance with Code of Civil Procedure §1011.

☐ By Overnight Delivery to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(c), by placing a true and correct copy thereof enclosed in a sealed envelope, with delivery fees prepaid or provided for, in a designated outgoing overnight mail. Mail placed in that designated area is picked up that same day, in the ordinary course of business for delivery the following day via United Parcel Service Overnight Delivery.

☐ By Facsimile Transmission to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(e).

☐ By Electronic Service. Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed in item 5. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

Thomas Stanek
Elizabeth M. Townsend
Ogletree, Deakins, Nash, Smoak &
Stewart, P.C.
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Phoenix, AZ 85016

Michael G. Pedhirney
Littler Mendelson
650 California Street, 20th Floor
San Francisco, CA 94108

I declare under penalty of perjury that the foregoing is true and correct. Executed in Oakland, California, on this date, September 3, 2013.



Esther Aviva